Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES

IN RE PETITION OF
LUCY R. EDWARDS, ESQUIRE

Petitioner,

v.

CLIMATE HEATING & COOLING,

Respondent.

On Petition for Writ of Certiorari
to the District of Columbia Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Lucy R. Edwards, Esquire
3001 Georgia Avenue, NW
Washington, DC 20001
202-829-9601

QUESTIONS PRESENTED

I. Does a Lawyer have a liberty interest that is protected under the due process clause of the Fifth (and Fourteenth) Amendment to the United States Constitution in matters where the lawyer is sanctioned by the trial court for alleged discovery abuses?

II. Should appellate courts in the District of Columbia be required to provide heightened due process protections for lawyers sanctioned for discovery abuses, since this jurisdiction views such a sanction in connection with violations of the Rule 8.4(d) of the Rules of Professional Responsibility which affects a lawyer's licence to practice law?

LIST OF PARTIES TO THE PROCEEDING

The parties to this proceeding are Lucy R. Edwards, Esquire, former counsel for Thelma Ferbish and Petitioner herein. Thelma Ferbish, Plaintiff in DC Superior Case No. 03-CA-9260. Other parties are Climate Heating and Cooling, Defendant and Respondent; David Zachary Kaufman, Esquire, counsel for Respondent; and John Anderson, Esquire, substitute for Plaintiff.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED ..... -i-
PARTIES TO THE PROCEEDING ..... -i-
TABLE OF CONTENTS ..... -ii-
TABLE OF CASES CITED ..... -iii-
PARTIES TO THE PROCEEDINGS ..... -1-
JURISDICTION ..... -1-
STATEMENT OF THE CASE ..... -2-
REASONS FOR GRANTING THE WRIT ..... -14-
CONCLUSION ..... -15-
CERTIFICATE OF SERVICE ..... -15-

APPENDIX OF ORDERS

DISTRICT OF COLUMBIA SUPERIOR COURT
ORDER OF October 8, 2008 ..... App.1

DISTRICT OF COLUMBIA SUPERIOR COURT
ORDER OF March 29, 2008 ..... App.3

DISTRICT OF COLUMBIA COURT OF APPEALS
Opinion of February 28, 2008 Cited as Edwards v. Climate Heating and Cooling, 942 A.2d 1148 (DC 2008) App.7

DISTRICT OF COLUMBIA COURT OF APPEALS
Order of June 27, 2008 denying Petition for Rehearing/ Rehearing En Banc App.18

TABLE OF AUTHORITIES CITED

Abell v. Wang, 697 A.2d 996 (D.C. 1997) .....-13-

Bolling v. Sharpe, U. S. 497; 745 S.Ct. 693. (1954) ....-7-

Cobb v. Standard Drug Co; 453 A.2d
110, 112 (D.C. 1982).....-15-

Dellums v. Powell,
566 F.2d 231, 235-36 (1977)..... -12,16-

Edwards v. Climate Heating & Cooling,
942 A.2d 1148 (D.C. 2008) .....-1,6-

In re Gault, 387 U. S., 1, 33 (1967).....-10-

Hamilton v. Ford Motor Co., 636 F.2d
745, 747 (1980).....-8-19-

Jung v. Jung, 791 A.2d
46, 48 (D.C. 2002).....-8-

In re Ruffalo, 390 U. S. 544, (1968).....-8-

Van Durr v. Kator & Scott, 738 A.2d 579, 581
(D.C. 2002) .....-15-

Weiner v. Kneller, 557 A.2d 1306, 1309
(D.C. 1989) .....-13-

TABLE OF OTHER AUTHORITIES CITED

5TH & 14 AMENDMENT OF THE US CONSTITUTION.....-ii-

DC Super. Ct Rule 33 ..... -2-

DC Super. Ct Rule 34 ..... -2-

DC Super. Ct Rule26(b) ..... -10,16-

28 USC Sec 1257 (a) ..... -1-

Rule 37 .....-21-

Rule 37(a) .....-9,10-

Rule 37(b) .....-13,18-

DC Super. Ct R. 16 .....-13,18-

DC Super. Ct Rule 54(b) ..... -1-

Rule 8.4(d) ..... passim

Bar Rule XI 8(a)..... -1-

PARTIES TO THE PROCEEDING

The names of the parties to this proceeding are Lucy R. Edwards, Petitioner, (hereinafter called "Edwards"). Respondents Climate Heating & Cooling ("Climate") and David Z. Kaufman, Esquire, ("Kaufman") counsel for Climate. Other parties included *Thelma Ferbish*, ("Ferbish") Petitioner's former client. The Office of the District of Columbia Bar Counsel.

JURISDICTIONAL STATEMENT

On April 24, 2006, Petitioner Edwards noted an appeal timely to the District of Columbia Superior Court's Order entered on March 30, 2005 sanctioning her to pay legal fees to Respondent's Climate Heating & Cooling's counsel, David Z. Kaufmann for alleged discovery abuses. The trial court denied Edwards' Motion under DC Super. Ct Rule 54(b) for entry of judgment prior to the conclusion of the case for purposes of noting an appeal. The case was settled by entry of a consent *praecipe* on March 22, 2006. On February 28, 2008, following oral argument, the DC Court of Appeals entered an Opinion affirming the trial court's decision. **See *Edwards v. Climate*, 942 A.2d 1148 (D.C. 2008).**

Petitioner filed a Petition for Rehearing or Rehearing En Banc in the DC Court of Appeals from the Opinion of the Court. On June 27, 2008, the DC Court of Appeals denied the Petition for Rehearing or Rehearing En Banc.

Jurisdiction of the United States Supreme Court is invoked, pursuant to 28 U.S.C. §1257(a). Jurisdiction is also invoked under the Fifth Amendment to the United

States Constitution.

STATEMENT OF THE CASE

This case arose pursuant to the DC Superior Court's entry of two Orders sanctioning Edwards for her failure to submit timely responses to discovery requests. With the exception of minor changes, Petitioner incorporates herein the facts as outlined in her Petition for Rehearing or Rehearing En Banc filed in the DC Court of Appeals. Edwards represented Ferbish in an action against Climate for its failure to carry out specific performance, breach of contract and fraud in connection with the improper and incomplete installation of a furnace/air conditioning unit in her home. An initial scheduling conference was set for February 20, 2004 and rescheduled to March 12, 2004, due to Edwards' having suffered a heart attack in early February 2004. While Edwards was recuperating under doctor's care at home, her husband who suffered from lung cancer passed away on February 24, 2004. At the March 12, 2004 initial scheduling hearing, the trial judge set the case on a Track II Calendar.

On March 18, 2004, Climate mailed its first set of Requests for Interrogatories and for Production of Documents to Edwards. Climate later sent two other sets of Discovery Requests in the Summer and Fall. Pursuant to DC SCR Civ 33 and 34, Ferbish's responses to the first discovery requests were due within 30 days from the receipt of Climate's requests. Ferbish failed to submit her Responses to Climate's Discovery requests by April 19, 2004.

On the evening of April 19, 2004, Edwards' office fell prey to a devastating fire that destroyed her entire office,

including her computers and most of her clients' files either burned or were destroyed by water from the firemen's attempts to put out the fire. When Ferbish failed to answer the Discovery requests within 30 days, counsel for Climate, Kaufman sent out three letters dated April 27, May 20 and June 1, 2004 requesting responses to the overdue discovery.[1]

In response to a subpoena mailed to Edwards around May 20, 2004 requesting an inspection of the heating/cooling unit at Plaintiff's home, Edwards and Ferbish met Climate and Kaufman at Ferbish's home in early June, 2004 (prior to Climate's filing the First Motion to Compel) and an inspection of the installation of the unit took place as well as the damage caused to Ferbish's property as a result of the improper installation of the unit.

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[1] At least on one occasion prior to Kaufman's mailing of a third letter on June 1, 2004, Edwards informed counsel that her office had been burned entirely in April 2004, and that the fire had destroyed and misarranged her records and documents. She stated that delays were to be expected under these circumstances in submitting responses to the overdue Discovery requests. Edwards also discussed her recovery from a heart attack and her husband's ill health and death, all of which took place in February and early March, 2004. Petitioner cited these occurrences as grounds for additional delays in meeting with her client to obtain and review Ferbish's answers to Climate's Discovery requests. These circumstances and the related fall out took place almost concurrent with the due date for Climate's discovery requests under the Rules.

On June 11, 2004, Climate filed a Motion to Compel, a Motion to Extend Time for Defendant to Conduct Discovery and a Motion for Sanctions. Edwards filed a timely Opposition to the Motion outlining the extenuating circumstances described herein. On July 23, 2004, the trial court held a status hearing and entered an Order setting a new Scheduling Order for close of discovery and ordered Ferbish to answer Defendant's Discovery requests within 10 days of the date of the Order and for Ferbish to identify her witnesses by August 23, 2004. The trial court set a status hearing for October 8, 2004. Edwards failed to submit the Discovery responses, pursuant to the July 23, 2004 Order and she did not submit her witness lists on behalf of Ferbish, pursuant to the revised Scheduling Order.

Edwards' failure to provide Discovery responses to Climate's counsel apparently prompted Kaufman to file a Second Motion to Compel, Extend Time for Defendant to Conduct Discovery and Sanctions on September 2, 2004. Edwards filed an Opposition to this Motion and while the Second Motion to Compel was pending, Climate alleged that it sent Edwards a Notice of Deposition for Plaintiff to attend deposition on September 22, 2004 or as soon thereafter as possible. Neither Ferbish nor Edwards attended the deposition.[2]

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[2] Edwards argued in her Brief at p. 5 before the DC Court of Appeals that she nor her client never received the Notice of Deposition in the mail. She was experiencing extreme problems with receiving her mail at the office address, due in part to the fact that the Office was under renovation and the law firm could not physically occupy the space. On many occasions, the postal service despite requests to the contrary by Edwards was sending Edwards'

The trial court held a status conference on October 8, 2004 and at that time, the court entered another Order requiring Ferbish to submit her answers to Climate's Discovery requests and to identify her witnesses and designate her expert(s) opinions within ten days of entry of the Order. The trial court also ordered Ferbish to pay Climate $2,000.00 to cover Defendant's costs and attorney's fees incurred in connection with the filing of its first two Motions to Compel and presumably for Plaintiff's failure to attend deposition on 9/22/04. Edwards paid the $2,000.00 from her own funds.

On October 15, 2004, Edwards submitted Ferbish's Answers to Plaintiff's First Set of Interrogatories and Requests for Production of Documents. On October 28, 2004 (without contacting Edwards to determine when the remainder of the Discovery Answers would be forthcoming), Climate filed a Third Motion for Sanctions objecting generally to Ferbish's Answers to its Discovery requests as inadequate. Edwards filed substantial supplementation to Ferbish's Answers to Climate's Discovery requests on November 19, 2004. The trial court held a hearing on November 24, 2004, in connection with Kaufman's Third Motion for Sanctions. Despite Edwards' submission of thorough answers to Climate's Discovery Requests, the trial court decided that additional costs should be paid to Climate and it found that the responsibility for paying the costs rested with Edwards

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mail back or simply failing to deliver it. Kaufman made a transcript of the proceedings wherein he appeared without his client and stated that since "no one has appeared, " it was his contention to take this matter up before Judge Wright at the next status conference on 10/8/07.

rather than Ferbish.[3] Edwards attached a copy of the transcript of these proceedings from the hearing held on November 24, 2004. This particular transcript was unavailable when the other transcripts were ordered earlier in the appellate process. The trial court ordered Edwards to pay to Climate the sum of $4,842.00 to cover its attorneys fees and costs in connection with its efforts to obtain discovery. Thus, the total sum of money that Edwards had to pay as a sanction was $6,842.00.

On February 28, 2008, the DC Court of Appeals entered an opinion which is published in the Atlantic Reporter as *Edwards v. Climate Heating & Cooling,* 942 A.2d 1148 (D.C. 2008) affirming the decision of the trial court. Edwards filed a Petition for Rehearing or Rehearing En Banc pointing out alleged error in the DC Court of Appeals' decision. The Division of the DC Court of Appeals entered an Order on June 27, 2008 denying rehearing and the full court denied the Petition for Rehearing En Banc.

Following the Opinion of the DC Court of Appeals,

3

During these proceedings, Edwards revealed to the court that not only was she hampered in submitting responses to Climate's Discovery requests by her own extenuating circumstances, she had extreme difficulty in overcoming her client's reluctance to provide the needed answers. She was unable on many occasions to get in touch with Ferbish as the client was going back and forth to New York at the time. At the hearing on November 24, 2004, Ferbish asked that she be permitted to obtain new counsel and the trial court permitted Edwards to file a Motion to withdraw.

Edwards was contacted by letter from the DC Court of Appeals' Office of Bar Counsel. The Office of Bar Counsel requested that Edwards file a response to the allegations of discovery abuses contained in the Opinion, citing possible violations of Rule 8.4(d) of the DC Rules of Professional Responsibility. Bar Counsel opined a disciplinary matter against Respondent in these allegations which is pending Edwards' filing of the instant Petition in this Court.

REASONS FOR GRANTING THE PETITION

1. A Lawyer has a liberty interest that is protected under due process clauses of the Fifth (and Fourteenth) Amendment to the United States Constitution in matters where the lawyer is sanctioned by the trial Court for alleged discovery abuses.

The due process clauses under the Fifth Amendment to the United States Constitution applicable to the District of Columbia and adapted to the Fourteenth Amendment to the U. S. Constitution (see *Bolling v. Sharpe,* U. S. 497; 745 S.Ct. 693. (1954), applies in civil cases regarding discovery abuses. Although DC Supr. Ct. R. 37 provides the District of Columbia trial courts with an internal system to expeditiously move cases along and protect the public interests of its litigants from discovery abuses,
Edwards contends that when a lawyer representing a client is sanctioned for an alleged abuse of the discovery process, the appellate courts must provide heightened due process protections for that lawyer. This is true in that, the finding of a discovery abuse could potentially give rise to a disciplinary action in this jurisdiction.

Disciplinary actions are quasi-criminal proceedings

wherein heightened due process proceedings are instituted. See In re *Ruffalo,* 390 U. S. 544, (1968); In re *Gault,* 387 U. S., 1, 33 (1967). In light of this potential, a lawyer prosecuting an appeal even in a civil matter should be afforded heightened due process protections under the DC Appellate Courts standard of proof by clear and convincing evidence not by preponderance of the evidence used in review of most civil cases. Petitioner contends that this standard was not applied in her case. She incorporates herein, with some alteration, the Argument Section of her Petition for Rehearing or Rehearing En Banc filed in the DC Court of Appeals.

A. The Facts of this Case Do Not Dictate the Conclusion Reached by the Division of Flagrant Abuses of the Discovery and Violations of Court Orders.

The Division of this Court took the position that Edwards committed flagrant discovery abuses and her difficulties; however, legitimate, were not insurmountable. The Division opined that Edwards' compliance with discovery requests at the eleventh hour did not excuse what the appellate Court termed as her disregard of the court's orders. The Division was of the opinion that the sanction imposed upon Edwards, that is to pay $6,482, was justified to prevent her from profiting by her misconduct, and to enforce her compliance, as well as to compensate the injured party. *Hamilton v. Ford Motor Co.,* 636 F. 2d 745, 147 (1980); *Jung v. Jung,* 791 A.2d 46, 48 (D.C. 2002).

Edwards maintains that the Division of this Court made several errors in reaching the conclusions that the she purposefully employed obstructive tactics in bad faith and/or defaulted on her obligations through neglect or

incompetence in her attempts to submit responses to Climate's Discovery requests and to obey the trial court's Orders. Initially, the Division determined that Edwards' argument that Kaufman failed to comply with the provisions of DC SCR Civ 37(a) was erroneous in that Climate had complied with these requirements by attaching copies of three letter to Edwards. The Division went on to state that because Edwards had not served any response at all (pursuant to Rules 33, 34, or 36) to Climate's interrogatories and document requests, the meeting requirements of Rule 37(a) were waived. Rule 37(a) provides in pertinent part:

> Before any motion to compel discovery is filed, the affected parties or their counsel ordinarily must meet and confer in an effort to resolve the dispute and the moving party must certify that it made a "good faith" effort to obtain the material sought. The certification must describe the effort made and state the date, time and place of the meeting. The meet and confer requirement is "waived" if (1) the Motion concerns a failure to serve any response whatever to a Rule 33, 34 or 36 discovery request.

This record clearly reflects that Edwards and her client participated in discovery pursuant to Rule 34(b) prior to Climate's filing its first Motion to Compel and for Sanctions. Rule 34(b) provides in pertinent part:

> Any party may serve on any other party a request...(2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is

> served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated objection or operation thereon, within the scope of Rule 26(b).

The plain meaning of this section of Rule 34 is consistent with the fact that Edwards and Ferbish participated in discovery in June 2004, pursuant to Climate's request. The parties met at Ferbish's home along with Climate' s counsel and witnesses, and conducted an inspection of the unit and the damages that existed.

The Opinion of the Division on this point is erroneous. Edwards participated in discovery under Rule 37(a) in that she complied with Climate's request for an inspection of the unit pursuant to Rule 34. Therefore, the meet and confer Section of Rule 37(a) prior to filing a motion to compel was not waived and Climate did not comply fully with Rule 37(a) by sending Edwards three letters requesting Discovery. Edwards believes that it is necessary to bring up this issue because the Division is clearly of the opinion that she abused the discovery process and was neglectful of her duties to zealously seek to comply with responses to Climate's Discovery requests.

The truth is that despite her difficulties with her health, her husband's health and his death and burial by early March, 2004, this case was on course to the extent that she believed she could reasonably continue despite the difficulties. The problems that arose on April 19, 2004 (the same day that Climate's Discovery responses were due) with the fire is what essentially caused the delays in Edwards' compliance supplying answers to Climate's

Discovery Requests.[4] Contrary to the Division's Opinion, the extent and breadth of the fire, the total destruction of Edwards' office and the fall out from that occurrence with respect to Edwards' case load was so severe that during the

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[4] Climate through its counsel was not amicable through this process as he (counsel) purported in his opposition and at oral argument. Kaufman was informed by Edwards' office staff that she had suffered a fire. He knew by Edwards' paralegal's representations at the initial scheduling conference that she had suffered a heart attack. He called the fire "purported," indicating some disbelief that it occurred and he filed Motions to compel almost immediately after the time ran to submit discovery responses or after the expiration of the deadlines in the revised schedule of 7/23/04. He filed the third Motion to Compel almost immediately after the period allotted by the Court for submission of the Discovery Answers and he never called Edwards to inquire as to when the answers would be forthcoming. When Edwards did file the discovery responses in accordance with the Order of October 2004, he immediately filed a Motion to Compel and sought the court's intervention without giving Appellant the opportunity to complete the discovery. Kaufman never sought to reschedule Deposition although Edwards and her client indicated that they never received a copy of the notice in the mail. Instead, Kaufman filed three Motions to Compel seeking two thousand dollars each time plus court costs, and Edwards contends that Kaufman was clearly seeking to use Edwards' circumstances and the discovery rules to obtain money from Plaintiff and/or her counsel. Indeed, Edwards believes that the trial court basically awarded Climate the amount listed in each motion ($2,000.00 each) plus its costs.

first few months after the fire, the odds of Appellant completing discovery in this case with only minor delays were not only insurmountable, it was impossible. Edwards' submissions of complete Discovery Answers by the Fall of 2004, notwithstanding the Court's Order of July 23, 2004, was hardly a flagrant violation of a Court Order. Neither was Edwards' filing of Discovery Responses late a "flouting" of her obligations nor did she *choose* to wait to make a response until the trial court lost patience with her actions. (See, *Dellums v. Powell,* 566 F.2d 231, 235-36 (1977)).

The trial court in this instance made some limited concessions by extending the time to file answers to discovery requests to ten days and revising the discovery schedule to permit Edwards' submission of her witness list by the end of August and to grant Climate's request to propound additional discovery. However, the mitigating circumstances forced Edwards' non-compliance with the Order of 7/23/04 (and the fact that Ferbish was not really cooperative in supplying Discovery Answers).

Edwards, despite these difficulties, took the point of view that strictly construed, she had not fully complied with Discovery requests save her compliance with the subpoena to inspect the unit in June 2004 and paid the $2,000.00 to Kaufman, pursuant to the Order of October 8, 2004. She takes issue with the trial court's conclusion and the Division of this Court's Opinion that she failed to comply with both Orders of the Court. She complied with the trial court's Order of October 8, 2004 and submitted Discovery Responses to Climate on October 15, 2004 and two supplements to those responses by November 19, 2004 including an expert witness list and the expert witness's opinion to be presented at trial. The decision to impose a

Rule 37(b) or Rule 16 sanction is left to the broad discretion of the trial court and this Court will not disturb the trial court's ruling absent a showing that the sanction was too strict or unnecessary and unjust under the circumstances. *Weiner v. Kneller,* 557 A.2d 1306, 1309 (D.C. 1989); *Abell v. Wang,* 697 A.2d 996 (D.C. 1997).

Here, the trial court's ruling that Edwards should pay practically all of Climate's costs for its attempts to obtain discovery where *inter alia* the trial court acknowledged and invited testimony regarding her difficulties, where Climate clearly made no efforts to contact Edwards to discuss the overdue Discovery but generated three Motions to Compel and invariably invited the court's intervention which generated costs, and made no effort to reschedule deposition is consistent with an award that is substantially unjust. Likewise, the Division's position that Edwards engaged in serious misconduct, abuses of the discovery process and flagrant violations of the discovery process for failing to comply with one court order completely overlooks Petitioner's dire circumstances is also unjust.

On this record, it is not evident that Edwards committed such abuses or that her actions were willful, negligent, incompetent and in utter disregard of the discovery process. The fact that a court(s), triers of fact, may not have a full understanding or appreciation for what it is like to suddenly be displaced in one's work environment and the difficulties that follow (i.e. requiring the standard procedure after a motion to compel that Discovery Answers be submitted within 10 days when a fire has destroyed the lawyer's work place, equipment and files) should not be considered as abusive behavior or flagrant disobedience to the trial court's order by the

Division[5] to justify affirmance of the trial court's order. The circumstances herein clearly dictate that the award of such a sanction is harsh and unjust. The trial court abused its discretion in ordering Edwards to pay an additional $4,842.00 to Climate after it had received full and complete answers to it Discovery Requests. Moreover, Edwards' circumstances clearly justified no such award.

B. THE MITIGATING CIRCUMSTANCES SUFFERED BY EDWARDS RENDERED THE AWARD OF CLIMATE'S FEES AND COSTS UNJUST.

Edwards incorporates by reference the relevant portions of her argument in the previous section. The Division at pg. 7 of its Opinion stated that Edwards' excuses find scant support in the record and that she has not substantiated her claim that the award in this case was unjustified or unduly strict under the circumstances. The Division stated at footnote 8.

We note that Edwards has not provided this court with the transcript of the November 24, 2004, hearing, at which the court addressed Climate's third motion. Absent that transcript, we are in no position to conclude that the

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5

The language and flavor in the Opinion rendered by the Division that Edwards' conduct was so willful and abusive of the discovery process has resulted in the DC Bar Counsel opening up an investigation into this matter and requiring an explanation by Edwards to justify her "misconduct," since it may be a violation of the Bar Rules (conduct that seriously interferes with the administration of justice in this jurisdiction).

court abused its discretion in deciding that Edwards did not justify her failure to comply with its orders." Appellate review is limited to matters appearing on the record before us, and we cannot base our review of errors upon statements of counsel which are unsupported by the record." *Cobb v. Standard Drug Co;* 453 A.2d 110, 112 (D.C. 1982)...It is appellant's burden to "present this court with a record sufficient to show affirmatively that error occurred." **Id at 111;** see also *Van Durr v. Kator & Scott,* 788 A.2d 579, 581 (D.C. 2002)("lacking a transcript in this appeal, we have only the unsupported (and conflicting) statement of alleged fact in the parties' briefs...Accordingly, we have no choice but to affirm the judgment on appeal.").

Edwards sought and obtained a copy of the transcript of the hearing on November 24, 2004[6] which centered around Climate's Third Motion to Compel and for Sanctions. At the hearing, the trial court took extensive testimony regarding her extenuating circumstances but with particular reference to the fire and the related fall out. (**See Tr. at 5-38**). The trial court acknowledged that Edwards has suffered extenuating circumstances and these circumstances obviously interfered with her ability to answer discovery timely.

For example, the following colloquy took place between Kaufman and the Court:

6

When Edwards initially ordered the transcripts, the DC Court Reporter's Office indicated that there were no transcripts after November 19, 2004. When the decision was rendered by this Court, Edwards investigated again and insisted that there was a transcript of these proceedings which the court reporter finally located.

MR. KAUFMAN: [T]here have been lost documents, lost photographs, lost records. The word spoliation leaps to mind....

THE COURT: I don't think...there's spoliation if there's a fire. I mean, if there's a fire, which was not something that intentionally set... those things happen. And of course, if she doesn't have documents and if her client provided her the documents and they were destroyed in the fire, they can't be produced. I can only make a person produce what is actually in existence. **Tr. at 27-28**.

THE COURT: The problem that I'm facing now is that Ms. Ferbish wishes to obtain new counsel, I guess based upon her dissatisfaction with Ms. Edwards. And so that means_ _ and I think I have to give her that opportunity. The only question is what prejudice is it to your client. Now, obviously there's prejudice in terms of time. Well, time alone isn't enough. Obviously cost is a factor. I have required Ms. Edwards to pay him $2,000.00 in sanctions which somewhat mitigates any prejudice that you have, so what I'm looking for you...to tell me what prejudice it is to you[r] client by the Court's doing that, (granting a continuance for Ferbish to get new counsel] other than its just going to take longer... **Tr. at 26**.

MR. KAUFMAN: ...could Your Honor see the Court's way to mitigating my client's costs a little more here...(**Tr. at 30**) My client is not going to be happy as am I. (**Tr. at 31**).

THE COURT: What I will do is...consider a motion with an affidavit of what those costs are and an opportunity to review those...I don't have to tell you what to tell your client because I've been in private practice and I know

you've practiced long enough. But you know what my mother always told me sometime life isn't fair. And you have to live with it and make the best of what other opportunities provide you. In this situation your client may feel that life isn't fair, well, so be it. **(Tr. 11/24/04 at 30-33)**.

The trial court went on to express its condolences to Edwards in her loss and presumably the fire and stated that, "this has been a year that's obviously very difficult." The court was of the opinion that maybe Edwards should not have tried to handle all of her case load in view of these circumstances. **Tr. at 33**. What is clear from the court's consideration of the extenuating circumstances and the third motion was that it (the court) felt that it had already compensated Climate for its expenses by directing the $2,000.00 sanction and that out of fairness to Climate, it would consider additional costs for the delay caused by Ferbish's seeking new counsel. There is no evidence from this transcript that the trial court believed that Edwards engaged in conduct that constituted discovery abuses or even a flagrant disregard for its orders. The lower court appeared to be trying to adjudicate a remedy that was fair to all of the parties and believed that this monetary remedy should be borne by Edwards.

Unfortunately and despite the trial court's best efforts to prevent prejudice the award was not justified by the facts for two reasons and the award was exorbitant and caused extreme prejudice to Edwards who was already suffering financial deprivation based upon her personal losses and the fire. In essence, there is no evidence in this record that Edwards engaged in discovery abuses and the trial court did not find that she did. The lower court did indicate that Edwards experienced some difficulty in

handling the case correctly, but indicated that it believed her circumstances may have caused that difficulty. (**Tr. at 35**). The trial court made no finding of an abuse of discovery process, let alone a flagrant abuse. What is more important here is that the court appeared to be of the opinion that Edwards' circumstances were extenuating and difficult and it was her circumstances that resulted in the discovery delays and those circumstances were outside of her control.

In an effort to mitigate any prejudice caused to Climate, the court sanctioned Edwards to pay presumably for the additional delay after discovery requests caused by Ferbish's seeking new counsel. However, an award of an additional $4,842.00 is not justified in light of the circumstances. Edwards maintains that it was unfair to her for the court to recognize her circumstances as substantial justification for the delay and to recognize that the Discovery Answers provided by Edwards gave rise to a definite cause of action for Plaintiff to proceed and then to sanction her to pay an additional $4,842.00, without any explanation of why the costs were justified. The evidence here clearly supports Edwards' contentions that she should not have been sanctioned to pay such exorbitant legal fees to Climate in that the delay was substantially justified rendering the award unjust. Rule 37(b)(2)(E) and Rule 16(1).

Here the trial Court acknowledged that the late Discovery Answers were sufficient to give rise to a cause of action focusing particularly on the submission of the Expert Witnesses' (Mr. Levermore's) report about the improperly installed furnace. It also acknowledged Appellant's extreme difficulties due to extenuating circumstances. The trial court's reasoning and its ultimate

sanction is inconsistent with the normal reasons for granting such a large award that is, to levy sanctions to prevent the offending party from profiting by its misconduct and enforce compliance. *Hamilton v. Ford Motor Co.*, 636 F.2d 745, 747 (1980). Edwards maintains that this Court should rehear or rehear en banc the decision of the Division in light of the transcript of the proceedings on November 24, 2004 and in general in light of its view that the Orders of the trial court entered on March 30, 2005 should be affirmed, for her willful, intentional and flagrant discovery abuses and failures to obey court orders. This opinion is not supported by the evidence as set out in the Transcript of November 24, 2004.

II. - The Appellate Courts in the District of Columbia should be required to provide heightened due process protections for lawyers sanctioned for discovery abuses; since this jurisdiction views such a sanction in connection with violations of the Rule 8.4(d) of the Rules of Professional Responsibility which affects a lawyer's license to practice law.

Petitioner incorporates by reference the previous arguments outlined in Section I of the Reasons for Granting the Petition. Rule 8.4(d) of the DC Rules of Professional Responsibility states that it is professional misconduct for a lawyer to: (d) Engage in conduct that seriously interferes with the administration of justice. The District of Columbia Court of Appeals considers under Paragraph (d) acts by a lawyer such as: failure to cooperate with Bar Counsel; failure to abide by agreements made with Bar Counsel; failure to appear in court for a scheduled hearing; failure to obey court orders; failure to turn over assets of a conservatorship to the court or to the successor

conservator...[N 2] Comment to 2007 Revision, District of Columbia Bar Rules.

Paragraph 3 of the Revision of these Rules states that a lawyer violates paragraph (d) by offensive, abusive, or harassing conduct that seriously interferes with the administration of justice. Such conduct may include words or actions that manifest bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status. The question here is whether an alleged abuse of the discovery process wherein a lawyer files answers to discovery requests, untimely (despite justifiable mitigating circumstances) and is sanctioned to pay a fine by the trial court constitutes such a flagrant violation so as to warrant an investigation by Bar counsel under Rule 8.4(d). The other question is whether violations of discovery rules in civil proceedings where sanctions of such violations are under the sound discretion of the trial court, are within the scope of Rule 8.4(d). Put another way, whether Bar Counsel as an arm of the D. C. Court of Appeals can continue a matter that has been decided by the highest court without the recommendation of the Court for further proceedings.

Edwards contends that Bar Counsel should not be allowed to initiate further disciplinary proceedings from Opinions generated by the DC Court of Appeals without the consent of the Court especially for discovery violations. Such proceedings offend the concept of due process and denies to the lawyer the equal protection of the laws under the Fourteenth Amendment to the U. S. Constitution. Edwards submits that discovery violations are not the type of violations within the meaning of Rule 8.4(d). This Rule is interpreted as conduct that offends the disciplinary process or the public interest. (i.e. bias, prejudice, etc.). A

lawyer who submits late discovery requests, hardly commits conduct that "seriously interferes" with the administration of justice within the meaning of this Rule.

The DC Court of Appeals in the instant matter referred to Edwards' conduct as "flagrant" violations of Rule 37 that justified her being sanctioned to pay Climate's legal fees. Apparently the use of the words flagrant in the published opinion alerted Bar Counsel that it could initiate disciplinary proceedings against Petitioner. The end result, if petitioner is sanctioned as a result of Bar Counsel's investigation, is that she could be suspended from the practice of law on a matter that she was already sanctioned for by the trial court and for the filing of untimely discovery answers.

Petitioner contends that Bar Counsel has exercised too much license and the DC Court of Appeals has not adequately protected Edwards' due process rights. Such a process if allowed to continue (Bar Counsel reads as a case in the Atlantic Reporter and goes after the lawyer) could prevent a lawyer from even attempting to pursue his or her rights in the appellate court. Moreover, the notion that an arm of the Appellate Court can be allowed to institute a quasi-criminal process from a matter that has concluded without the recommendation of the concluding court offends the concept of fairness under the due process clauses of the Fifth and Fourteenth Amendment.

Edwards reserves the right to supplement this Petition for a Writ of Certiorari.

CONCLUSION

Petitioner prays that this Court will grant this Petition for writ.

Respectfully submitted,

Lucy R. Edwards, #197020
3001 Georgia Avenue NW
Washington, DC 20001
(202) 829-9601

DATED: SEPTEMBER 25, 2008

APPENDIX OF ORDERS

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

FILED
IN OPEN COURT
OCT 08 2008
Superior Court
of the District of Columbia
Washington, DC

T. Ferbish

Plaintiff,

v.

Climate Heating Cooling

Defendant

AT LAW NO: **03-9260**

Pursuant to D.C. Code 11-906 and Civil Rule 40-I the case captioned at the right is assigned for all purposes to Civil Calendar No. 13

J. Wright

NextEvent: Status Conference 10/8/04

ORDER

This Court, after reviewing Defendant's Motion and Defendant's Response, after careful consideration and for good cause hereby

ORDERS that the Plaintiff answer Defendant's Interrogatories and Request or Documents within ten (10) days and

ORDERS that Plaintiff identify her Witnesses and Designate her expert(s) within ten(10) days and

ORDERS that Defendant only shall have (60) days after receipt of Plaintiffs Discovery responses to complete

Discovery, including depositions, and

ORDERS Plaintiff to pay Defendant $2,000.00 to cover Defendant's costs and attorney's fees incurred in the filing of this Motion to Compel

FILED
IN OPEN COURT
OCT 08 2004
Superior Court
of the District of Columbia
Washington, DC

And the Case Continues. SH 11/19/04 @ 10:30 pm
ENTERED this 8th Day of October, 2004.

/s/ Melvin R. Wright
Wright

Copies to:

Kaufman Law, A Professional Corporation
11350 Random Hills Rd., Suite 650
Fairfax, VA 22030

Lucy Edwards, Esq.
3001 Georgia Ave., NW
Washington, DC 20001

App. 3

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

THELMA FERBISH,
Plaintiff

v.

CLIMATE HEATING COOLING,
Defendant

Civil No. 03 CA 9260
Calendar Number 13
Judge Melvin R. Wright

ORDER

Upon consideration defendant's Motion for Costs, the various responses, and for good cause, this Court FINDS:

that the attorneys for Climate Heating Cooling have incurred a total of $4,608.00 in fees and $234.00 in costs;

that Climate bleating Cooling has demonstrated the reasonableness and necessity of the attorneys' fees and costs incurred.

After reviewing the billing statements provided by the defendant, Climate Heating Cooling, it is this 29th day of March 2005,

ORDERED that former counsel, Lucy Edwards, pay to defendant $4,842.00 to cover defendant's costs and attorneys' fees incurred I their attempts to conduct

discovery in the above captioned matter.[7] A status hearing shall be set for April 15, 2005 at 100:00 a.m. in Courtroom 200.

Melvin R. Wright
MELVIN R. WRIGHT, ASSOCIATE JUDGE
DOCKETED MAR 30 2005

Copies to:

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Fairfax, VA 22030

Lucy R. Edwards, Esq
3001 Georgia Avenue, NW
Washington, D.C. 20001

Thelma Ferbish
1304 Floral Street, NW
Washington, D.C. 20012

John Anderson, Esq.
666 - 11th Street, NW
Washington, D.C. 20001

---

7 This Court cannot find plaintiff Ferbish responsible for these costs due to counsel's failure to comply with Court orders.

App. 5

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

PRAECIPE

The 22nd Day of MARCH, 2006

☐ CIVIL ACTION JM-170
☐ LANDLORD AND TENANT JM-255
☐ SMALL CLAIMS JM

Thelma Ferbish
Plaintiff

vs.

CA 03-9260
Case Number

Climate Heating & Cooling
Defendant

The Clerk of said Court will please mark the above captioned matter as settled & dismissed with prejudice as to all claims and counter claims. The parties agreed the settlement is confidential and the defendant makes no admission of liability. The parties agree the Lennox equipment will be removed at the plaintiff's cost and held for pickup by defendant. Plaintiff will have no responsibility for the Lennox equipment once removed from her house. The defendant will certify mail a check in the settlement amount within 48 hours of a phone call acknowledging pickup of the Lennox equipment.

App. 6

Linda S. Rodgerson for
Climate Conditioning Corp.

Thelma Ferbish

Approved:
Judge Melvin R. Wright
3/22/06

Attorney for Defendant

/s/Kaufman

Address
11350 Random Hills Road
Suite 650
Fairfax, Va 22030

Phone No. 703/764-9080

Bar No. 433135

Attorney for Plaintiff

/s/ John Anderson

Address
5335 Wisconsin Ave.,
NW #440
Washington, DC 20015

Phone No. 202/628-8585

Bar No. 420236

District of Columbia Court of Appeals Reports

EDWARDS v. CLIMATE CONDITIONING, 942 A.2d 1148 (D.C. 2008)

Lucy R. Edwards, Appellant v. Climate Conditioning Corporation, t/a

Climate Heating and Cooling, Appellee.

No. 06-CV-453.

District of Columbia Court of Appeals.

Argued February 6, 2008.

Decided February 28, 2008.

Appeal from the Superior Court, Melvin R. Wright, Jr.

Page 1149

[EDITORS' NOTE: THIS PAGE CONTAINS HEADNOTES. HEADNOTES ARE NOT AN OFFICIAL PRODUCT OF THE COURT, THEREFORE THEY ARE NOT DISPLAYED.]

Lucy R. Edwards, pro se.

David Zachary Kaufman, for appellee.

Before GLICKMAN and FISHER, Associate Judges, and STEADMAN, Senior Judge.

GLICKMAN, Associate Judge:

Appellant Lucy Edwards contends that the trial court abused its discretion by ordering her to pay the opposing party's costs and attorney's fees as a sanction for her discovery violations. We affirm the court's orders.

Edwards, an attorney, represented Thelma Ferbish in her lawsuit against appellee Climate Conditioning Corporation ("Climate") for breach of contract, negligence, and fraud in connection with a furnace installation. Climate served Edwards with its initial set of interrogatories and document requests on March 18, 2004. Under Super. Ct. Civ.K. Rules 33 and 34, Ferbish's responses were due within thirty days, [fn1] but no responses were forthcoming. On April 27, May 20, and June 1, 2004, Climate's counsel David Kaufman, sent letters to Edwards asking for responses to the overdue discovery. Edwards did not answer those letters. After two unproductive conversations with Edwards in June, and with the close of discovery nearing, Kaufman filed a motion to compel discovery pursuant to Super. Ct. Civ. R. 37 (a) (2). On July 23, 2004, after a hearing, the court granted Kaufman's motion. Perhaps because Edwards cited extenuating circumstances, including recent health issues and a fire in her law office in April, the court did not impose any sanction at that time. However, the court ordered that Climate's outstanding discovery requests be answered in ten days. The court also issued a revised scheduling order, [fn2] which, among other things, required the appellant to identify her witnesses and disclose the substance of her experts' opinions by the end of August.

Edwards did not comply with either the July 23 discovery order or the revised scheduling order, leading Kaufman to file a second motion to compel discovery and for sanctions on September 2, 2004. While that motion was

pending, Kaufman noticed Ferbish's deposition for September 22. Neither Edwards nor Ferbish appeared for the deposition. [fn3]

the parties returned to court for a hearing on Climate's motion on October 8, 2004. On this occasion, the court ordered Ferbish not only to answer Climate's discovery

Page 1151

requests, identify her witnesses, and disclose her experts' opinions within ten days, but also to pay Climate $2,000 to cover its costs and attorney's fees in filing its second motion to compel. Edwards paid this monetary sanction from her own funds.

A week after the October 8 hearing, Edwards served partial answers to Climate's discovery requests, together with a witness list and expert witness designation. The information provided in purported compliance with the court's discovery and scheduling orders was vague and incomplete. Among other deficiencies, the perfunctory disclosures did not reveal the substance of the opinion testimony anticipated from Ferbish's "key" expert witness or the full identities of her other witnesses (such as an anonymous witness identified only as Ferbish's "play sister"). Kaufman there upon filed what he called a third motion for sanctions. After holding a hearing on November 24, 2004 (at which Ferbish discharged Edwards as her counsel), and despite Edwards' belated supplementation of her discovery responses on November 19, the court decided to impose a sanction. Finding that the responsibility for disobeying its directives rested with Edwards rather than her client, the court ordered Edwards to pay Climate $4,842 to cover the attorney's fees and costs it had incurred in

trying to obtain discovery.

"Pretrial discovery is intended to operate via the parties' voluntary cooperation with a minimum of judicial oversight, and consequently, it is vulnerable to parties who choose to employ obstructive tactics in bad faith "[fn4] or who default on their obligations through neglect or incompetence. Because such conduct causes harm to innocent litigants and jeopardizes the fairness and integrity of trial proceedings, a court "has a duty to take proportionate and effective countermeasures" against a party, or a party's attorney, found to have abused or subverted the discovery process. [fn5] Super. Ct. Civ.R. 37, like its federal counterpart, [fn6] enumerates the different sanctions that a court may impose for unjustified noncompliance with discovery requests or disobedience of a court's discovery order. One of those sanctions is an award of reasonable expenses, including attorney's fees. Depending on which provision of Rule 37 applies, the court may award any expenses "incurred in making the motion" to compel, [fn7] "caused by the failure" to obey the court's order, [fn8] or "cause by the failure" to respond at all to interrogatories, document requests or a deposition notice. [fn9] the decision to impose Rule 37 sanctions "is vested in the broad discretion of the trial court, and we will disturb the ruling only for an abuse of discretion." [fn10] Generally speaking, we will find such an abuse only where the sanctions are "too strict or unnecessary under the circumstances. "[fn11] However,

Page 1152

whether or not other sanctions are imposed, "in the absence of substantial justification for a refusal to comply (or other circumstances that would render an award unjust], the

award of expenses is mandatory against a party whose conduct necessitated a motion to compel discovery."[fn12]

The same principles apply with respect to noncompliance with scheduling orders (and other pretrial orders) issued pursuant to Civil Rule 16.[fn13] Much like Rule 37, Rule 16(1)
authorizes thc court to impose a rangc of sanctions and specifically requires the court to order payment of reasonable expenses, including counsel fees, "incurred because of any noncompliance with this Rule," unless "the noncompliance was substantially justified" or "other circumstances make an award of expenses unjust. "[fn14]

Edwards contends that the court abused its discretion by imposing unduly strict monetary sanctions in response to improperly-filed motions to compel discovery. Her principal claim is that Climate's counsel filed thc motions without trying to meet with her to resolve their discovery dispute informally or otherwise satisfying the "good faith effort" requirements of Rule 37(a)/ [fn15]

this casc is not govcrncd by subscction (a) of Rule 37, however. Subsection (a), which addresses motions to compel proper responses to discovery requests, applied to Climate's first motion to compel. [fn16] But the court imposed no sanctions in response to that first motion. Rather, the sanctions were triggered by Climate's second and third motions, which pertained mainly to the failure of Edwards and her client to comply with the court's discovery and scheduling orders. The imposition of sanctions for disobedience of those orders is governed not by Rule 37 (a), but by Rules 37 (b) and 16 (0. "(T)here is no requirement in Rule 37 (b)

Page 1153

that a party try to secure the discovery through negotiations before filing a motion for sanctions. The requirement that a court already have ordered the discovery obviates the need for the meet and confer. "[fn17] there likewise is no meet-and-confer requirement in Rule 16(1). Once the court has entered an order, there is nothing more for the parties to negotiate. Thus, the court was not precluded from imposing monetary sanctions on Edwards merely because Climate did not undertake to satisfy the requirements of Rule 37 (a) in connection with its second and third motions.

Rule 37 (b) (2) (E) provides that "the Court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the Court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." As previously noted, Rule 16(1) contains a similar provision applicable when a party fails to obey a scheduling order. Although Edwards has offered various explanations for her failure to comply with the court's orders including her health, the fire in her law office, and her client's uncooperativeness - her excuses find scant support in the record. [Fn18] Edwards has not substantiated her claim that the award in this case was unjustified or unduly strict under the circumstances. In point of fact, the court accommodated Edwards's stated problems by extending her time to provide discovery. Edward's difficulties, however legitimate, were not insurmountable, and her non-performance in spite of the court's consideration was flagrant. "There is no requirement that (a) failure (to comply with discovery] be willful or malicious; a conscious [or negligent] failure to comply is sufficient."[fn19]

Furthermore, that Edwards ultimately may have provided the discovery at issue at the eleventh hour does not excuse her disregard of the court's orders or undermine the court's decision to sanction her. "If parties [were] allowed to flout their obligations, choosing to wait to make a response until a trial court has lost patience with them, the effect [would] be to embroil trial judges in day-to -day supervision of discovery, a result directly contrary to the overall scheme of the discovery rules."[fn20]

lastly, on the present record, we are not prepared to second guess the

Page 1154

court's determination as to the proper amount of its monetary award. While Climate petitioned for $7,578 in attorney's fees and costs, the reimbursements ordered by the court totaled $6,842 ($2,000 plus $4,842). A reduction probably was appropriate because not all of the expenses claimed by Climate were attributable to Edwards's violation of the court's orders. Edwards has not attempted to establish that the court applied the wrong metric or allowed unrecoverable expenses. Some degree of imprecision in the court's discretionary calculation is certainly tolerable (if not also inevitable), and questing for further accuracy would impose on both the parties and the judiciary additional burdens exceeding the potential benefits. Moreover, a measure of strictness was warranted. Discovery sanctions under Rule 37(b) are intended to be punitive as well as compensatory and to serve as a general, as well as a specific, deterrent. [fn21] sanctions are levied to penalize the offending party, to prevent it from profiting by its misconduct, and to enforce compliance, as well as to compensate the injured party. Sanctions also are meant to

deter other litigants from engaging in discovery abuses in other cases. [fn22] We conclude that the monetary sanctions in this case fairly and reasonably served those purposes. We find no abuse of the court's broad discretion.

Affirmed.

[fn 1] See Super. Ct. Civ. R. 33 (b), 34 (b).

[fn 2] See Super. Ct. Civ. R. 16 (b).

[fn 3] Edwards asserted that she and her client had received no notice of the deposition, perhaps because mail had not been delivered. The record contains no trial court ruling on the credibility of this explanation.

[fn 4] Jung v. Jung, 791 A.2d 46, 48 (D.C. 2002).

[fn 5] id. At 49 (emphasis added).

[fn 6] Super. Ct. Civ. R. 37 of the Federal Rules of Civil Procedure. We construe our local rule "consistently" with the federal rule even though it differs from that rule in certain respects. *Habib v. Thurston,*
517 A.2d1, 8 n. 13 (D.C. 1985) (citation omitted).

[fn 7] Super. Ct. Civ. R. 37 (a) (4).

[fn 8] Super. Ct. Civ. R. 37 (b) (2).

[fn 9] Super. Ct. Civ. R. 37(d).

[fn 10] Firestone v. Harris, 414 A.2d 526, 527 (D.C. 1980).

[fn 11] Weiner v. Kneller, 557 A.2d 1306, 1309 D.C. 1989) (internal quotation marks and citation omitted).

[fn 12] Habib, supra note 6, 517 A.2d at 8 (internal quotation marks and citation omitted), See Super. Ct. Civ. R. 37 (a) (4), (b) (2), and (d).

[fn 13] See Lowrey v. Glassman, 908 A.2d 30, 38 (D.C. 2006).

[fn 14] Super. Ct. Civ. R. 16(1) ; see Lowrey, supra note 13, 908 A.2d at 38 (citing Leslie v. LaPrade, 726 A.2d 1228, 1233 (D.C.1999).

[fn 15] Rule 37 (a) provides that before any motion to compel discovery is filed, the affected parties or their counsel ordinarily must meet and confer in an effort to resolve the dispute, and the moving party must certify that it made a "good faith effort" to obtain the material sought. The certification must describe the effort made and state the date, time and place of the meeting. The meet and confer requirement is "waived" if

Super. Ct. Civ. R. 37(a).

[fn 16] Climate complied with the requirements of Rule 37 (a) when it filed its first motion to compel by attaching copies of Kaufman's three letters to Edwards. Because Edwards had no served any response at all to Climate's interrogatories and document requests, the meeting requirements of Rule 37 (a) were waived..

[fn 17] 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE-CIVIL § 37.40 (2007). See, e.g., Chiuminatta Concrete Concepts, Inc. v. Cardinal Indus., Inc., No. CV 95-4995, 1998 U.S. Dist. Lexis 17224, at "13

(C.D. Cal. Aug. 4, 1998) (stating that the "meet-and-confer requirement does not apply to motions for sanctions under Federal Rule 37 (b) for the failure to comply with a court order.").

[fn 18] We note that Edwards has not provided this court with the transcript of th November 24, 2004, hearing, at which the court addressed Climate's third motion. Absent that transcript, we are in no position to conclude that the court abused its discretion in deciding that Edwards did not justify her failure to comply with its orders. "Appellate review is limited to matters appearing in the record before us, and we cannot base our review of errors upon statements of counsel which are unsupported by the record." Cobb v Standard Drug Co., 453 A2d 110, 112 (D.C. 1982) (Internal quotation marks and citation omitted). It is an appellant's burden to "present this court with a record sufficient to show affirmatively that error occurred." It is an appellant's burden to "present this court with a record sufficient to show affirmatively that error occurred." id. At 111; see also an Durr v. Kator & Scott, 788 A.2d 579, 581 (D.C. 2002) ("Lacking a transcript in this appeal, we have only the unsupported (and conflicting) statements of alleged fact in the parties' briefs . . . . Accordingly, we have no choice but to affirm the judgment on appeal.")

[fn 19] Firestone, supra not 10, 414 A.2d at 527.

[fn 20] Dellums v. Powell, 184 U.S. App. D.C. 339, 343-44, 566 F.2d 231. 235-36 (1977).

[fn 21] See, e.g., Hamilton v. Ford Motor Co., 205 U.S. App.D.C. 37, 39, 636 F.2d 745, 747 (1980) ("the principal purpose of Rule 37 (b) is punitive, not compensatory.").

The same is true of Rule 16(1), which incorporates the sanction provisions of Rule 37 (b) by express reference.

[fn 22] See Nat'l Hockey League v. Metro. Hockey Club, 427 U.S. 639, 643, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976).

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District of Columbia
Court of Appeals

No. 06-CV-453
LUCY R. EDWARDS,
APPELLANT,

v.

CLIMATE HEATING
& COOLING,
APPELLEE.

FILED JUN 27 2008
CLERK

CAB9260-03

Before: Washington, Chief Judge, Farrell, Ruiz, **Reid, *Glickman, Kramer, *Fisher, Blackburne-Rigsby, and Thompson, Associate Judges; *Steadman, Senior Judge.

ORDER

On consideration of Appellant's *pro se* motion for leave to file the lodged petition for rehearing en banc and to accept into the record, the transcript of the proceedings in the trial court on November 24, 2004, it is

ORDERED that the motion for leave to file the lodged petition is granted and the Clerk is directed to file the lodged petition for rehearing or rehearing en banc. It is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

**Associate Judge Reid has recused herself from this case.

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